Supreme Court, U.S.
FILED
001949 JUN 21 2001
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No.

IN THE

Supreme Court of the United States

CALVIA LYNN HILL,

Petitioner,

v.

WAL-MART CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

CALVIA LYNN HILL
Petitioner Pro Se
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91pp

QUESTION(S) PRESENTED

1. Should a company willfully enforce a policy of "The Customer is always right;" whereby an employee is coerced into forfeiting his or her civil rights and privileges as a condition to remain gainfully employed?

2. How can the Respondent's management action be justified to terminate an employee, due to an outrate behavior of a customer who uses racial, insulting slurs toward the employee?

3. Why is it that no prevision to compel the lower courts not to review the merits of a case in a manner of ex parte proceeding, hearing nor in an ex parte review, whereby forfeiting the party's civil right?

4. Under 28 U.S.C. 2104, "Reviews of State Court Decision," can the federal lower courts not apply, the same standards of reviewing as stated in 28 U.S.C. 2104, in the reviewing of state court's decision on the merits of the case?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to proceeding in the court whose judgment is the subject of this petition is as follows:

The parties to the proceeding below were:

Petitioner: Calvia Lynn Hill, *Pro Se*

Respondent(s): Wal-Mart Corporation Counsel for the Respondent(s) is

Todd M. Sullivan. Counsel
WOMBLE, CARLYE, SANDRIDGE & RICE
P. O. Box 831
Raleigh, NC 27602

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PETITIONER'S NOTE TO HONORABLE U. S. SUPREME COURT JUSTICES:

For the purpose of this Writ, the Petitioner use the following to denote Exhibits:

See P/App., Ex. ---- denotes (See Petitioner/- Appendix, Exhibit ----).

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at **Appendix A** to the petition and is

[ ] reported at _____

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The opinion of the United States district court appears at **Appendix C** to the petition and is

[ ] reported at _____; or,

[X] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at **Appendix F** to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the

_____

court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was **March 27, 2001.**

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date **May 17 , 2001**, and a copy of the order denying rehearing appears at **Appendix B.**

[ ] An extension of time to file a petition for writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

[ ] For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of the decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Supreme Court has jurisdiction as cited under F.R.A.P. 28 U.S.C. § 1254, Courts of appeals, Certiorari, certified questions.

I. Constitutional Provision

(1) Case in the courts of appeals may be reviewed by the Supreme Court by the following method:

> By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> This case involves the employer's established policy and guidelines that are unconstitutional in general, and as it was applied to the petitioner in this case, as such action of discrimination upheld by the Fourth Circuit and the District Court. This issue was raised by the Petitioner in the trial court, but the presiding judge never referenced the true reason for the wrongful dismissal.

The supporting constitutional and statutory provision, that are involved: The petitioner was a litigant in the Fourth Circuit. The petitioner for Redress of Grievance as a guaranteed right by the First Amendment

to the Constitution of the United States, rights to petition the government, including the courts, for redress of grievances where denied by the lower courts. **(Appx. B)**

The Fifth Amendment to the Constitution due process under the law was also denied. The Seventh Amendment to the Constitution guarantees the Petitioner a right to a jury trial. The Federal Judiciary of the circuit and the trial court denies the Petitioner's request for jury trial. The Fourteen Amendment to the Constitution, provide that no state make or enforce any law which shall abridge the privileges or immunities. . . nor shall any state deprive any person of. . ., without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The Petitioner has clearly been denied such rights as noted. **(Appx. C)**

The Appeal and trial courts have clearly fail to apply the doctrine of **substantive due process,** clauses of the Fifth and Fourteenth Amendments to the United State Constitution require legislation to be fair and reasonable in content as well as application. Such may be broadly defined as the constitutional guarantee that no person shall be arbitrarily deprived of his life. The essence of substantive due process is protection from arbitrary and unreasonable action, and such action do not exclude the courts. The merits of this case will support that the lower courts fail to review this case issue in the mind set of substantive evidence, by ignoring the due process of law. The merits of this case absolutely show that the trial court's action was in fact unreasonable.

II. Statutory Provision

In the determination of the violation of the Petition, Title VII Civil Rights Act of 1964 amended 42 U.S.C. 2000 et seq. and Title I of the American with Disabilities Act 1992. In the review of the merits of the case, this Honorable body will discover through its statutory construction that, the lower court ruling, undisputable conflict with the interpretation of the laws and principle of standard in ruling, as a matter of law, on the issue of the summary judgment ruling, pretextual and retaliation, standards in relation to establishing the discrimination, in regard to such standard of review enacted by this Honorable body.

The lower courts without proper basis, contrary to the statutory rule of, the F.R.C.P. (56) Summary Judgment, when there is no genuine issue of material fact, such judgment should be granted. The Petitioner merits were not reviewed under such standard, that was proper to grant the summary judgment, in favor of the Respondent.

The Rule of Evidence 602 witnesses, lack of personal knowledge, 801 (c), 802 Hearsay Rule, in reference to F.R.C.P. 43 (e) taking of testimony and affidavits, Rule 12 (b) 4 affidavits to determine issue of facts in connection with motion, Rule 56 (e) summary judgment from supporting affidavits, (g) affidavits made in bad faith, the merits of the Petitioner, in this case, will and has refuted the decision/ruling, reason the lower court refused to grant the Petitioner 's summary judgment, with the proper application of the stated statutory rule in this paragraph.

Statutory provision involved on the issue in this case matter in accordance with Title 28 U.S.C. Judiciary and Judicial Procedure, 28 U.S.C. §§ 2071, 2072 (a) (b), 2073, and 2074. The Petitioner could have prevailed providing that, such a (new) Rule of Evidence Procedure Method of Prescribing, to "compel" Judges to write reference notes to each and all parts of any type of evidence, documentation presented in the record for review in the judges; Order, Judgment, Decree, Decision, Conclusion of Law, (Opinion, in the appellate review of the appeals court and trial judges only), and Memorandum/Decision, clearly articulating each and every part of the evidence facts for its validity, in according with the Rule of Evidence, and citing what Rule of Evidence apply to each presented evidence placed in the case file and docket.

If such standard is not in compliance by the presiding judge, magistrate and or, commissioner the presiding official action of non-compliance shall be reviewed as a violation of 28 U.S.C. § 455, and either party will be granted a rehearing or a review at the lower court on the merits of the case.

Petitioner believes that if such rule as stated "Compelling the judge to write reference notes. . ." became law, it will possible abolish ex parte proceeding, hearing and any ex parte review, by the lower courts.

There may be a possibility of court cases not being appealed in such large amount because the presiding judge would be placed in a position, whereby he/she is compelled to comply with such standard. This will, in

fact, cut the case load in the higher courts. Such rule clearly raises a national concern of public interest in particular for p*ro se* litigants who will not be appointed counsel by the courts. With such rule in place it will possibly bar the Fourth Circuit Court of Appeals from such acts to affirm the lower court dishonest ruling and lawless acts, "by unpublished per curiam decisions," avoiding exposure of its own lawlessness to the public.

STATEMENT OF THE CASE

This case come to the U. S. Supreme Court as a result of the Petitioner prevailing on the merits in a state court ruling, North Carolina Employment Security Commission's ruling and decision in **(Appx. F).** The Respondent did not file an appeal in the North Carolina Supreme Court, nor any District Court, for judicial review. The Respondent Wal-Mart would not reinstate the Petitioner to his former position.

The lower federal courts did not review the merits of this case in favor of the Petitioner, in the review of the North Carolina E.S.C. finding of the facts, as with such standard that would be applied by this Honorable body 28 U.S.C. § 2104 state judgment/decision.

Undisputed Facts of Retaliation Timeline

1. Petitioner was hired on or about 7th of August 1997 from such time until March 1998, the Petitioner had no adverse poor job performance and no misconduct behavior noted until on the 12th of March 1998, following the Administrative Grievance filed with the Wal-Mart home office headquarter. Complaints of discrimination, in the area of sexual harassment by gender, by way of disparate treatment. Petitioner advised management that any adverse action as a result of this complaint could be viewed by the courts as retaliation. **(P/Ex. 1)**

2. Petitioner received a pretextual verbal council from the Respondent's Management, one month after the Respondent's Assistant Manager, Mr. Leroy was

terminated, on the 16th of April 1998, as a result of the Administrative Grievance.

3. Petitioner was given another pretextual adverse coaching from both the Respondent's General Store Manager, Mr. Brad Downs and Assistant Manager, Pamela Oler on the 29th of June 1998. Petitioner once again informed the Respondent's Management that if such action did not stop, Petitioner would fill a law suit as a corrective action.

4. The merits of the case clearly shows that the alleged reason by the Respondent for the dismissal of the Petitioner, for poor job performance, and misconduct, is not consistent with the reason and the finding of the facts by the North .Carolina E.S.C. **(Appx. F)**

5. The Respondent never presented any evidence of whom this alleged customer was. No witness to account for any loud and threatening manner toward a customer, in the Wal-Mart store. The only evidence is an affidavit written by the store manager who was not at the store on, or during the time the event took place on the 2nd of October 1998. **(P.Ex. 2)**

6. The Respondent used its company policy of **"The Customer is Always Right"**, to justify their retaliatory action against the petitioner to have him discharged, because the Petitioner refused to apologize after he was racially insulted by, the Respondent's customer. The Respondent's policy is unconstitutional, when misused to justify unlawful employment practices. **(P/Ex 3)** The dismissal of the Petitioner by the Respondent was clearly

understood by the North Carolina E.S.C. that the Petitioner was discharged because Petitioner failed to follow company policy, whereas, the Petitioner refused to apologize to a customer.

7. The merits of the case clearly shows that the Respondent, in fact, retaliate circumventing its own company policy governing employees grievances that "you can go to your coach to talk about it without fear of retaliation." **(P/Ex . 4)**

8. The Respondent's only evident, this one Affidavit, holds no merits by which a summary judgment in favor of the Respondent should not have been granted. The issue alleged in the Affidavit **(P/Ex. 3),** was not appealed to the North Carolina E.S.C. in opposition of the Petitioner's claim. The Respondent one and only document to support a summary judgment ruling was written in bad faith, F.R.C.P. 56 (g), and the Affidavit is not consistent with the Ruling and Decision of the North. Carolina E.S.C.'s finding of the facts. **(Appx. F)**

9. In **(Appx. C at pg. 28),** the trial judge's Order states that "The EEOC's " right to sue letter, dated the 27 of May 1999, announced that its investigation failed to disclose evidence of employment discrimination." Such statement is in error; as stated. The EEOC's dismissal and notice of right to sue letter states, "Based upon its investigation, (not a court hearing) the EEOC is unable to conclude that the information obtained establishes violations of the statues. This does not certify that the Respondent is in compliance with statues."

10. The summary judgement must be reverse for the following reasons, that the trial judge granted the Respondent summary judgment on a claim that was not filed by the petitioner.

11. The claim/charge filed by the Petitioner was not one of "same sex gender discrimination" (Black male). The Respondent created the same sex, race, color, claim as a non discriminatory defense, because the Respondent did not have any evidence, nor witnesses to refute the North Carolina E.S.C. Finding of the Facts.

12. There was no filing of color or racial discrimination. The Petitioner did not allege that he was terminated because he was a "Black male." By the trial judge statement of "gender discrimination," without showing or referencing the opposite sex as part of the gender in the claim, the summary judgment must be reversed in favor of the Petitioner. The charge filed is clearly that of sex discrimination by gender implying the opposite sex, retaliation and the ADA claim.

13. The lower court reference the statement from the Respondent's agent, Manager Brad Downs as reasonable evidence to grant summary judgment to Respondent. **(P/Ex. 5).** The statement does not comply with the Rule of Evidence. The information was called in by telephone; there is no authentication to the identification of the person making the call in accordance with Rule 901 (g), there are no time and date of the alleged three incident, there are no eye witnesses that can corroborate the alleged event. The Respondent alleged that there were twenty witnesses, but they only submitted one affidavit.

This written statement is clearly that of what is known as, "Hearsay", Rule 801 (c) , 802, and the credibility of it is not supported with material facts. Rule 806 attacking the supporting creditability because the information was given to the store manager after the discharge of the Petitioner.

14. The Respondent's agent, Mr. Alvert Nesbit was the Petitioner's first line supervisor who clearly stated during the hearing that "I have not had any problem at all with Mr. Hill job performance nor any misconduct." The Respondent did not refute such statement in their summary judgment, nor did they refute the statement during the North Carolina E.S.C. appeal review. The finding of the fact in **Appx. F, pg. 40a at line 5**, clearly states that "the employer subsequently decided to discharge the claimant as a result of the October 2, 1998 incident," and not for poor job performance as alleged by the Respondent in their summary judgment.

ADA Claim

1. Petition's merits of ADA violation was evident when the Respondent stated that Petition was terminated for reason of poor job performance, according to **P/Ex. 2**, affidavit of the Respondent's management. In according with the guideline under Title I of the American Disability Act (ADA), the Respondent is required to request medical examination when an employer is having difficult performing his or her job effectively.

2. According to Title I ADA Manual of January 1992, ch 6. 6, page vi – 13, "If an employer has excessive absenteeism or exhibits other performance

problem, an examination may be needed to determined if the problem is caused by underling medical condition. . . "Ch 7. 3, pg VII-2, Nondiscrimination in all Employment Practices. The ADA prohibits discrimination against a qualified individual with a disability on the basis of disability in the following employment practices: hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination. . ." The trial court failed to apply the ADA law in this case matter. The Respondent had clear knowledge of the Petition's medical disability. The Respondent's management was given the document showing the Petitioner's recognized disability by the ADA. **(P/Ex. 6)**, Bipolar Disorder.

Hill Vs. N.C. Department of Correction
95 OSP 1460

The Petitioner is not requesting a DE NOVA on the issue of this case . The lower court Judge James Fox failed to state that, his Chief J Judge Terrance Boyle, did likewise as he did , which was to ignore the ruling of the state court judges, who ruled in favor of the Petitioner, Administrative Law Judge Beecher R. Gray, and affirmed by the State Personnel Commission. **(P.Ex. 7)** It the bias and habitual behavior of the 4th Circuit Court and the North Carolina to ignore a *pro se* litigant who prevailed in a state court, that is why the Petitioner moved to file the case in Tennessee.

REASONS FOR GRANTING THE PETITION

The compelling reason by which this petition should be granted is that the merits in this case matter clearly shows that the U.S. 4th Circuit Court of Appeals, has entered a decision in conflict with the decision of another United States Court of Appeals, to include its very own court. Same issue.

Such ruling in this case also conflict with decision made by the U.S. Supreme Court. The lower court did not apply the statutory rule 28 U.S.C. 2104 as shown in the following case cites.

Petitioner Shows Case Cite in Support of Conflicting Decisions

1. In *Elizabeth F. Smith v. First Union National Bank* (No 98-22-00), 4th Cir. 19 Jan. 2000, the 4th Circuit interpreted the foregoing Supreme Court decision in *Brown v. Perry*, 184 F. 3d 38 (4th Cir. 1999) that "Wal-Mart policy on sexual harassment includes any type, whether sexual, . . . is not tolerated. This standard was not applied in the Petitioner's case, *Hill v. Wal-Mart*.

2. The lower court makes no reference to the fact that Petitioner's merits clearly shows that Wal-Mart's reason for nondiscrimination was in fact pretextual. The lower court did not review the merits, in raising the "ultimate question" of discrimination, apart from just establishing a *prima facie* case. The ultimate question standard of review is clearly cited in: *Aikens v. U.S. Postal Service*, 460 U.S. at 714 Id. 711, 717. In case cite *Texas Depart.*

Of Community Affairs Vs. Burdine, 450 U.S. 248 (1981), the pretextual review standard was a major fact in the determination of nondiscriminatory reason. Such standard was not applied in this case, *Hill v. Wal-Mart*.

3. As in *St. Mary's Honor Cts. V. Hicks*, 509 U.S. 502, 515 (1993) and Beall V. Abbott Labs, 130 F 3d., 614, 619 (4th Cir. 1997), such review of standard in retaliation showing a casual connection was not applied in *Hill v. Wal-Mart*, whereas, Wal-Mart was, in fact, motivated to retaliate against the Petitioner after Petitioner filed a complaint which resulted in the dismissal of the Respondent's agent, Assistant Manager, "Leroy."

4. In *Keith W. Cline Vs. Wal-Mart*, 155 F. 3d 1317 (11th Cir. 1999), the plaintiff prevailed. She was racially harassed by Wal-Mart's management. In the Petitioner's case, Wal-Mart used its policy of the "Customer is Always Right," to terminated the Petitioner because the Petitioner refuse to apologize to the customer whose racial remarks were directed against Wal-Mart employees.

5. According *to Julie Deffenbaugh-Williams Vs. Wal-Mart*, 156 F. 3d 581 (5th Cir. 1998) the plaintiff prevailed on claim due to wrongful discharge for dating an African-American man which shows Wal-Mart support of racial discrimination overtones.

6. In *Lillian D. Dudley Vs. Wal-Mart*, 155 F. 3d 1317 (11th Cir. 1999), the plaintiff prevailed in her case by showing that she was racial harassed by the management of Wal-Mart. This case further helps to substantiate the

Respondent's support of racial discrimination of its minority employees.

7. A plaintiff prevailed on a claim of hostile work environment in *Peggy Kimzey Vs. Wal-Mart*, 107 F. 3d 568 (8th Cir. 1997), whereby the plaintiff was forced into taking constructive discharge. Also the Petitioner did not take constructive discharge while in the employment of the Respondent because he felt that he was doing his job and never through that the Respondent would violate his civil rights.

8. Another case where the Respondent was a party in *Bettie Jo Holland Vs. Wal-Mart*, 956. S.W. 2d 590 (Tex. App Tyler 1997), again was found to have retaliated against the plaintiff for filing a worker's compensation claim. The Petitioner had worked in the employment of the Respondent for more than eight months with a good to excellent work record, which drastically changed to a poor work record immediately after the Petitioner filed a complaint against the Respondent.

9. In *Virginia Stinger Vs. Wal-Mart*, Wayne, Ky., Circuit Court, Case No. 95C10228 the plaintiff prevailed on wrongful dismissal.

The Petitioner's issue of claim are clearly synonymous to the discriminatory practices as stated in the aforementioned cases, whereas the lower courts in different circuits have ruled for the plaintiff, against Wal-Mart's acts of discrimination against its employees.

CONCLUSION

Based upon reviewing the merits in this case matter, the Petitioner respectfully request that this Honorable Supreme Court grants this petition, and reverse the summary judgment and grant the damage amount for compensatory and punitive damages to the Petition, as requested in the filing of the complaint.

Respectfully submitted,

CALVIA LYNN HILL, PETITIONER PRO SE
On this the 22nd day of June 2001.

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2361

CALVIA LYNN HILL,

Plaintiff – Appellant,

Versus

WAL-MART STORES, INCORPORATED,

Defendant – Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, Senior District Judge. (CA-00-425-5-F(2))

Submitted: March 22, 2001 Decided: March 27, 2001

Before WILKINS, LUTTIG, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Calvia Lynn Hill, appellant Pro Se. Todd M. Sullivan, WOMBLE, CARLYLE, SANDRIDGE & RICE, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Calvia Lynn Hill appeals the district court's order granting summary judgment in this employment discrimination action. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Hill v. Wal-Mart Stores, Inc., No. CA-00-425-5-F (2) (E.D.N.C. filed Sept. 26, 2000; entered Sept. 27, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Appx. B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: May 17, 2001

No. 00-2361
CA-00-425-5-F (2)

CALVIA LYNN HILL,

Plaintiff – Appellant,

versus

WAL-MART STORES, INCORPORATED,

Defendant – Appellee.

ORDER

Calvia Lynn Hill has moved this court to vacate an order denying his petition for rehearing en banc as untimely. He asserts that his petition was timely under Fed. R. App. P. 25 (a) (2) (B), which states that a brief or appendix is timely filed if it is mailed on or before the last day of the relevant time period. We reject Hill's argument, as a petition for rehearing is not a brief or appendix, and conclude that his petition was not timely

because the clerk did not receive the papers within the time fixed for filing. Fed. R. App. P. 25 (a) (2) (A). Therefore, we deny Hill's motion to vacate and his motion to abolish the mandate.

For the Court

/s/ Patricia S. Connor
Clerk

Appx. C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:00-CV-425-F(2)

CALVIA LYNN HILL	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
WAL-MART STORES, INC.,	)	
Defendants.	)	

This matter is before the court for ruling on the parties' cross-motions for summary judgment, and on the plaintiff's miscellaneous ancillary motions. All motions have been the subject of exhaustive briefing and are ripe for disposition.

FACTUAL BACKGROUND

In the light most favorable to the plaintiff, Calvia Lynn Hill, the factual predicate for this lawsuit and the pending motions is as follows. Hill, a 40-year old African-American male, worked a the Fayetteville, North Carolina Wal-Mart from august 7, 1997, until October 15, 1998, as a sales associate. Not quite two months into his tenure, Hill alerted Wal-Mart to "disrespectful treatment or

harassment" to which he was subjected by another sales associate named Tony. In a typed letter dated September 29, 1997, and entitled "Administrative Grievance," Hill described Tony's conduct toward him including verbal insults and yelling in the presence of customer, "a disrespectful racial undertone" to Tony's comments, and Tony's manner of "talking down" to Hill and insulting his intelligence. Hill concluded his letter by commenting, "I trust that the work environment would be free of being harassed and or any retaliation because I have file an grievance." Exhibit 2 to Hill's Memorandum in Opposition to Wal-Mart's Motion to Transfer and in support of his Motion for Summary Judgment (hereinafter "Docket # 8").

Unfortunately, Hill encountered other problems of which he informed Wal-Mart in another typewritten letter dated March 12, 1998, and also entitled, "Administrative Grievance." Therein, Hill described the pattern of harassment and discrimination to which he had been subjected by his "Coaching Team" "without any just cause on my part of doing any thing wrong." Exhibit 1 to Docket # 8. The March 1998 letter contained, *inter alia*, the following advice to Wal-Mart:

> As we know harassment and sex discrimination is a violation of Title VII U.S. Federal Code 42, 2000e and N.C. Gen Statute 99D-1 Interference with Civil Right. Ignorances on any ones part of the law or policy is no excuse to justify anyone action of deliberate or arbitrarily events of disrespectful treatment of sex discrimination or repeated harassment, with the intent to impose direct

or indirect or indirect threats of intimidation. "If an employee resigns because of intolerable working conditions created or permitted by the employer, this may CONSTITUTE ACTIONABLE CONSTRUCTIVE DISCHARGE.["]

Id.

About a month later, on April 16, 1998, Hill received a "verbal coaching" as a result of his being away from assigned work area, his failure properly to complete his work tasks, his visiting other departments while on duty, and his failure to report to work on time. On June 29, 1998, Hill's supervisor, Pamela Oler, completed a Coaching for Improvement Form noting Hill' "questioning direction given by supervisor in a hostile manner" earlier that week when the supervisor again had found Hill visiting coworker in another department during duty hours. Exhibit 4 to Docket # 8. Oler noted that upon being confronted, Hill "became very defensive and argumentative." *Id.* The Form indicated the "nest level of corrective action" would be a "Decision Day."1 *Id.*

Hill responded in writing to the allegations by denying them, and by noting that he already had warned management about harassing and retaliating against him for filing the Administrative Grievances. He reported that store manager "Mr. Brad (Downs) has deliberately fail to respond to my concern by allowing such action to continue on. . . as a result of his lack of management skill. . . . I clearly spell out that there will be no adverse

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1 A "Decision Day" is a day off work during which the employee is to contemplate his continued employment with Wal-Mart.

action of retaliation as a result of my self filling a charge." *Id.*

On July 6, 1998, Hill underwent his annual Associate Evaluation. *See* Exhibit 5 to Docket # 8. Overall, his performance was rated as "Below Standard," but his supervisors noted that he "shows honesty," "follows the dress code," "expresses himself clearly," and is "100% on training on CBL." *Id.* However, the Evaluation also commented that Hill "has had several customer complaints of service," "needs to improved [sic] on productivity, zoning and staying in his work areas," "is not a good listener," and "has excessive tardiness and absentees." *Id.* In the area of the evaluation form reserved for "associate comment," Hill wrote that he would respond in writing on July 9, 1998. See id. However, the record does not contain such response, if any.

On July 21, 1998, Hill received another Coaching for Improvement Form for "excessive tardiness and absenteeism," listing dates, and stating that the next level of corrective action would be a "Decision Day." Exhibit 6, Docket $ 8. Hill's response to the report was that he was "in and out of Fed Court on a major case which involves me as a plaintiff/pro se C.L. Hill v. N.C. State.

We are in major litigation." Id.2

On October 11, 1998, another Coaching for Improvement Form at Decision Day level was completed by Hill's supervisor. See Exhibit 7 to Docket # 8. Supervisor Nesbit reported that on that date, Hill failed either to report to work or to call in. See id. The next level of corrective action would be "termination." Id. In his written response, Hill reported that his "plan of action will be clearly express in full detail with all facts and conclusive of the subject matter no later than 17 October 1998. Associate in delay in responding due to pending counsel on subject matter." *Id.*

According to a document entitled "Adjudicator's

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2 Hill has appended to his "Memorandum of Law Motion to Vacate Order to Transfer" in the instant case (Docket # 54) documents generated in the Office of Administrative Hearings case no 95 OSP 1460, in which Hill sought removal of a written warning for unacceptable personal conduct from his personnel file with the N.C. Department of Correction where he worked as a Correctional Health Assistant from September 1994 until December 15, 1995. The ALJ recommended that the warning be removed, see Exhibit 54, and, according to the August 24, 1998 letter from Associate Attorney General Dorothy Power, the warning finally was removed. See Exhibit 56. Thereafter, Hill sued his former employer in this court, see *Hill v. North Carolina Department of Correction*, No. 5:98-CV-429-BO, for sexual harassment and violation of the Americans with Disabilities Act ("ADA"). The Fourth Circuit Court of appeals affirmed Chief Judge Terrence W. Boyle's order allowing the defendant's motions to dismiss and for summary judgment and denying Hill's motions. See *Hill v. North Carolina Department of Correction*, No. 99-1310 (4th Cir. Sept. 3, 1999) (UP). It apparently is this litigation to which Hill referred in his July 1998 Coaching Improvement Form.

Summary of Telephone Interview," Exhibit 10 to Docket # 8, that Hill has appended to his Memorandum,3 after Hill failed to report for work on October 11th, he was given a "Decision Day" but did not return to work until October 14th. This Summary indicates Hill was terminated on October 15th for failing to report to work on October 11th. *See id.* Hill's explanation to Ms. Watson was that he had tried to call into work (long distance from Raleigh) to report that he was sick, but that his call did not go through. He reported to Ms. Watson that he was fired because of a customer complaint. Hill also explained to Ms. Watson that Wal-Mart was harassing him and placing him under surveillance because of the grievances he had filed, and suggested that Wal-Mart's awareness of Hill's diagnosis of bi-polar affective disorder and suspected Gulf War Syndrome contributed to its decision to terminate him. *See* id.

On October 16, 1998, the day after Hill's termination, store manager Brad Downs prepared a statement in which he reported three incidents involving Hill and customer Carolyn DeAndrade. Each alleged incident involved inappropriate behavior on Hill's part including threatening remarks and behavior and yelling. *See* Exhibit 24 to Docket # 8. The final incident also was reported by Brenda Collins, indicating that it took place on October 2, 1998. *See* Exhibit 20 to Docket # 8.

Hill applied with the North Carolina E.S.C. for unemployment benefits effective October 25, 1998. Upon

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3 This is a report by North Carolina Employment Security Commission ("E.S.C.") Adjudication Unit employee, Helyn Watson, of a telephone interview with someone from Wal-Mart and with Hill incident to Hill's application for unemployment compensation.

initial consideration, Adjudicator Helyn Watson determined that Hill was disqualified for benefits. Hill appealed and Appeals Referee Betsy McCormick conducted a hearing on December 31, 1998, at which Hill, and Wal-Mart employees Nesbit, Mitchell, and Collins were present. Ms. McCormick determined by an undated Decision, first, that Hill was ineligible for benefits for the week of October 18, 1998 because his filing therefor was delayed by circumstances within his control. See Exhibit 22 to Docket #22. Ms. McCormick also found, inter *alia*, that Hill was discharged for refusing to apologize to a customer after being directed by his supervisor to do so, and was not discharged in retaliation for his complaints of gender discrimination. *See id.* Ms. McCormick concluded that Hill had been fired for "misconduct" and, as a result, was disqualified to receive unemployment benefits under N.C. Gen. Stat. 96-24(2). See id.

Again Hill appealed the E.S.C.'s determination and field with the Cumberland County, North Carolina E.S.S. Office a 7-page typewritten document entitled "Matter of Concern in Litigation" dated January 8, 1999. 4 *See* Exhibit 34 to Docket # 8. In a decision dated February 18, 1999, J. Parker Chesson, Jr., Chairman of the E.S.C. of North Carolina, announced his decision that Hall had bee discharged from his job with Wal-Mart and that the discharge was not based on either misconduct or substantial fault. *See id.*

On December 16, 1998, shortly before the hearing in his first appeal of the denial of unemployment insurance

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4 The record before this court contains no indication that Wal-mart defended the administrative determination at this appellate level.

benefits, Hill filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("E.E.O.C."), alleging that he had been fired on October 15, 1998, in retaliation for his "opposing unlawful acts under Title VII" and on account of his disability. See Exhibit 25 to Docket # 8. The cover sheet of his Charge did not allege gender or racial discrimination, but he stated in his accompanying Affidavit that he had advised Mr. Downs in March, 1998, that he felt he was being treated differently because he is male. See id. Wal-Mart responded to the Charge by letter dated February 23, 1999. *See* Exhibit 35 to Docket # 1. the E.E.O.C.'s "right to sue" letter, dated May 27, 1999, announced that its investigation failed to discover evidence of employment discrimination. *See* Exhibit to Complaint (Docket # 1).

PROCEDURAL HISTORY

Hill brought the instant action by Complaint filed on August 18, 1999, in the Middle District of Tennessee, where he then resided. He alleged he was sexually harassed, terminated by Wal-Mart because of his sex and in retaliation for his engaging in protected conduct, and discriminated against in violation of the Americans with Disabilities Act. *See* Complaint (Docket # 1). He seeks $10,000,000.00 in compensation for "mental anguish, slander, embarrassment, inconvenience, loss of enjoyment of life, suffering and punitive damages." *Id.*

For seven months, the parties litigated Wal-Mart's

Motion to Transfer the case to this district,5 and on March 23, 2000, the Honorable William J. Haynes, Jr., ordered the transfer. See Docket # 51. During that sever-month period, Hill filed a Motion for Summary Judgment (Document #17), a Motion for Directed Verdict and Memorandum in Support thereof (Docket # # 22 and 23), an Amended Complaint (Docket # 25), a Motion/quest for Oral Argument (Docket # 27), a Supplemental Motion for Directed Verdict (Docket # 28, 6 a Motion to Ascertain Status (Docket # 30), a Motion for Entry of Default (Docket # 31), a Motion to Dismiss Wal-Mart's Late Filing and Memorandum in support thereof (Docket # # 41 and 42), a Supplemental Motion/Request to Expedite Oral Argument (Docket # 47), another Motion for Directed Verdict (Docket # 48), a Memorandum (Docket # 51), a Motion to Vacate Transfer Order and Memorandum in support thereof (Docket # # 53 and 54), a Notice of Appeal (Docket # 56), and a Motion to Proceed *In Forma Pauperis* (Docket # 57). At this court's invitation, Hill filed a supplemental

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5 The defendant, Wal-Mart, and its agents involved in the allegedly discriminatory conduct are present in this district, in which Fayetteville, North Carolina, is located.

6 This motion is based on Hill's assertion that store manager Downs committed perjury in submitting his affidavit in support of Wal-Mart's summary judgment motion. As additional support for his Motion for a Directed Verdict, Hill attached as an exhibit his Military Profile Record Review

pleading entitled Motion for Directed Verdict/Summary Judgment and Memorandum in support thereof 7 (Docket # # 67 and 68). Many of Hill's Memoranda are supplemented by voluminous exhibits. Additionally, Hill filed responses and replies to each of Wal-Mart's motions, which are a Motion to Transfer (Docket # 5), a Motion for Summary Judgment (Docket # 11), a Motion for Status Conference (Docket # 35), a Renewed Motion for Status Conference (Docket # 49), and a Supplemental Memorandum in support of Motion for Summary Judgment (Docket # 66). All the pending motions are ripe.

ANALYSIS

The court has read every pleading and exhibit of record of this case. The court has considered the parties' respective positions and the authority for those positions upon which the parties rely. In doing so, the court has viewed the evidence in the light most favorable to Mr. Hill, *see Reeves v. Sanderson Plumbing Products, Inc,*. 120 S. Ct. 2097, 2110 (2000), and has given him the benefit of the doubt because he is a *pro se* litigant, cf. *Haines v. Kerner*, 404 U.S. 519 (19720 (construction of *pro se* prisoner complaint).

Wal-Mart concedes that Hill has made out some of the

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7 In support of this Memorandum, Hill attached an Appendix entitled, "99 Verdicts Against Wal-Mart," a publication of a Nashville, Tennessee organization called the Wal-Mart Litigation Project. It is Hill's position that these 99 thumbnail summaries of verdict's against Wal-Mart demonstrate "a reprehensible consist behavior pattern of the Defendant poor/bad management." (Docket # 68).

essential elements of a *prima facie* case of gender discrimination. Wal-Mart agrees that Hill (a) is within a protected class (a male), and (b) was subjected to an adverse employment action (he was terminated). Although Wal-Mart denies that Hill (c) was qualified for the position, the undisputed evidence is that Hill was not (d) replaced by a person outside of the protected class; his successor also was a black male. Where, as here, a male plaintiff is replaced by another man, a defendant's motion for summary judgment should be allowed in a gender discrimination case. *See Brown v. McLean*, 159 F.3d 898, 905-06 (4th Cir. 1998), *cert, denied*, 526 U.S. 1099 (1999).

In order to make out a prima facie case of disability discrimination under the ADA, a plaintiff must demonstrate (a) that he was "disable",; (b) that he was discharged; (c) that at the time of the discharge he was performing at a level that met his employer's legitimate expectations; and (d) that his discharge occurred under circumstances raising a reasonable inference of illegal discrimination. *See Runnebaum v. NationsBank*, 123 F.3d 156, 164 (4th Cir. 1997), overruled on other grounds, *Bragdon v. Abbortt*, 524 U.S. 624 (1989). Here, Hill contends his diagnosis of bi-polar adjustment disorder constitutes a "disability" and that Wal-Mart was aware of that diagnosis. Even assuming that Hill's bi-polar disorder was a disability, a fact disputed by Wal-Mart, the record before this court unequivocally demonstrates that Hill's performance was *not* meeting his employer's legitimate expectations for reasons other than and in addition to his shortcomings in the area of customer-relations. *See, e.g.*, Exhibit 5 to Docket # 8 (Annual

Evaluation concluded Hill's performance was "Below Standard.").

Hill's theory that he was fired in retaliation for complaining about unlawful discrimination also fails. The prima facie case for such a claim consists of three elements: (a) that the plaintiff engaged in protected activity (Wal-Mart does not dispute that Hill's right to complain about perceived illegal discrimination is a protected activity), (b) that he suffered an adverse employment action (Wal-Mart concedes that Hill was fired), and (c) that the two events were causally related. The court agrees with Wal-Mart that the record contains absolutely no evidence suggesting a causal relationship between his September 1997 and march 1998 Administrative Grievances and his termination October 1998. In fact, the evidence of record submitted by Hill himself in support of his motions strongly suggests that he was terminated because Wal-Mart believed Hill had abused the company absenteeism policy and had violated company policy in his verbal confrontations with his co-workers, supervisors and customers. Notwithstanding Hill's almost taunting "warnings" to Wal-Mart from the outset of his employment, he has pointed to no evidence tending to show that Wal-Mart's motive in terminating him was retaliatory in nature.

In short, although the record reveals a good many factual disputes between the parties, none is "material" to the issue now before the court, which is whether Hill has met the burden imposed on him by virtue of Wal-Mart's summary judgment motion. To survive a motion for summary judgment, the nonmoving party must demonstrate that factual disputes are material and

genuine. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catreet*, 477 U.S. 317, 322-23 (1986).

The Supreme Court counseled in Celotex that the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *See id.* The moving party is "entitle to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *See id.* Here, as to each of his claims, Hill, the nonmoving party, has failed to demonstrate to the court that he can produce competent evidence of every essential element of his case against Wal-Mart.

Accordingly, for the foregoing reasons, it hereby is ORDERED that Wal-Mart's Motion for Summary Judgment (Docket # 11) is ALLOWED and this action is DISMISSED. Consequently, all pending motions are DENIED AS MOOT. The Clerk of Court is DIRECTED to close this case.

SO ORDERED.

This the 23rd day of September, 2000.

James C. Fox
JAMES C. FOX
United States District Judge

(Eastern District's Court Seal)

I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By Jayne C. Clark
Deputy Clerk

Appx. D

No. 00-5458

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CALVIA LYNN HILL	)	**FILED**
	)	May 08 2000
Plaintiff,	)	LEONARD
	)	GREEN, Clerk
v.	)	ORDER
	)	
WAL-MART STORES, INC.,	)	
Defendants.	)	

Before: GUY, BOGGS, and SUHRHEINRICH, Circuit Judges.

This matter is before the court upon initial consideration of appellate jurisdiction

A review of the documents before the court indicates that by order entered March 24, 2000 the district court transferred the civil rights action to the United States District Court for the Eastern District of North Carolina. Appellant appealed that order.

This court lacks jurisdiction over this appeal. An order of a district court transferring the case to a different district court is not appealable. *See In re Dalton*, 733 F.2d 710, 714-15 (10th Cir. 1984); *Lemon v. Druffel*, 253 F.2d 680, 683 (6th Cir. 1958). Although an order of transfer can be reviewed by a petition for a writ of mandamus, the remedy of mandamus is a drastic

one to be invoked only in extraordinary circumstances to confine a lower court to its lawful jurisdiction or to compel it to perform its duty to exercise authority. *In re Parker*, 49 F. 3d 204, 206 (6th Cir. 1995). No extraordinary circumstances have been shown in this case.

It is ordered that the appeal is dismissed.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

Appx. E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NAHVILLE DIVISION

CALVIA LYNN HILL	)	
	)	
Plaintiff,	)	NO. 3:99-0739
	)	JUDGE HAYNES
v.	)	
	)	
WAL-MART STORES, INC.,	)	
Defendants.	)	

ORDER

In accordance with the Memorandum filed herewith, the Court concludes that the defendant's motion to transfer this action (Docket Entry No. 5) is GRANTED and this action with its other pending motions is TRANSFERRED to the Eastern District of North Carolina.

It is so ORDERED this the 23rd day of March, 2000.

WILLIAM J. HAYNES, JR.
United States District Judge

This document was entered on the docket in compliance with Rule 58, and /or Rule 79 (a), FRCP, on 3-24-00 By: BJ

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EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

IN THE MATTER OF: **Commission Decision No. 99(UI) 0487**

Calvia L. Hill
194 Paddle Wheel Road
Fayetteville, NC 28314-0331
S.S. No. 242-23-5818

Wal-Mart Associates, Inc.
c/o The Frick Company
Post Office Box 283
Saint Louis, MO 63166-0283

STATEMENT OF CASE:

The claimant filed a NEW INITIAL CLAIM 9NIC) for unemployment insurance benefits effective October 25, 1998. Thereafter, the Commission determined that the weekly benefit amount payable to the claimant was $251,00 and, during the benefit year established by the claimant, the maximum amount of unemployment insurance benefits payable to the claimant was $5,271.00.

In his appeal, the claimant alleged that the Appeals Referee "suborn perjury." The record does not support such allegation. Instead, the record reflects that the Appeals Referee properly assisted both parties in providing testimony in accordance with ESC Regulation No. 14.18 (K).

The claim was referred to an adjudicator on the issue of separation from last employment. Adjudicator Helyn Watson issued a determination under Docket No. 42525 finding the claimant disqualified for benefits. The claimant filed an appeal from the determination and the matter

came on to be heard by an Appeals Referee under Appeals Docket No. IV-A-09112. The following individuals appeared at the hearing before the Appeals Referee: Calvia L. Hill, the claimant; Barbara Mitchell, Personnel Manager, Alvert Nesbit, Assistant manager and Brenda Collins, Assistant Manager, witnesses for the employer. On January 5, 1999, Betsy McCormick, appeals Referee, issued a decision finding the claimant disqualified from receiving unemployment insurance benefits pursuant to G.S. §96-14(2). The CLAIMANT has APPEALED the decision of the Appeals Referee on the Separation Issue.

FINDINGS OF FACT:

1. The claimant has filed continued claims for unemployment insurance benefits for the period October 25, 1998, through October 31, 1998. The claimant has registered for work with the Commission, has continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. §96-15 (a).

2. The claimant was employed from August 7, 1997 until October 15, 1998, as a sales associate. He was discharged for allegedly threatening a customer on October 2, 1998, and subsequently refusing to apologize to that same customer.

3. On October 3, 1998, a white customer approached the claimant while the claimant was at work. The customer said "Hey boy, come over her boy." The claimant, who is black, replied "My name is Calvin Hill, not boy." The customer then said "You're just a boy to

me." The claimant then escorted the customer to the customer service desk for further assistance. He did not threaten the customer or raise his voice during the incident.

4. The customer subsequently complained to the assistant manager, Brenda Collins, and demanded an apology from the claimant. Collins and the customer then went to the claimant. Collins directed the claimant to apologize. The claimant refused because he felt he had done nothing wrong. He also felt he had been subjected to a racial slur.

5, The employer subsequently decided to discharge the claimant as a result of the October 2, 1998 incident.

MEMORANDUM OF LAW:

The Employment Security Law provides:

> An individual shall be disqualified for benefits. . . For the duration of his unemployment beginning With the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because the individual was discharged for misconduct connected with his work.

G.S. §96-14 (2).

Misconduct connected with the work is conduct

evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. G.S. §96-14(2). This definition has been judicially interpreted on many occasions. See, e.g., Intercraft Industries Corporation v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982); Yelverton v. Kemp Furniture Industries, 51 N.C.App. 215, 275 S.E. 2d 553 (1981); In re Cantrell, 44 N.C.App. 718, 263 S.E. 2d 1 (1980); In re Collingsworth, 17 N.C.App. 340, 194 s.E.2d 210 (1973).

The Employment Security Law also provides:

> An individual shall be disqualified for benefits. . . For a period of not less than four nor more than 13 weeks beginning with the first day of the first week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault on his part connected with his work not rising to the level of misconduct. Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not

> include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment. Upon a finding of discharge under this subsection, the individual shall be disqualified for a period of nine weeks unless, based on findings by the Commission of aggravating or mitigating circumstances, the period of disqualification is lengthened or shortened within the limits set out above. The length of the disqualification so set by the Commission shall not be disturbed by a reviewing court except upon a finding of plain error.

G.S. §96-14 (2A).

The essence of the substantial fault statutory provision under which the claimant was disqualified from receiving benefits is that if an employer establishes a reasonable job policy to which an employee can conform, his failure to do so constitutes substantial fault connected with work. Whether a job requirement is reasonable will vary depending on the nature of the employer's operations and what function the employee performs within the operations. The reasonableness of the employer 's job requirement must be determined on a case-bycase basis, taking in consideration the "totality of the circumstances surrounding the employee's function within the employer's business". "an employee has "reasonable control" when he has the physical and metal ability to

conform his conduct to his employer's job requirements". Lindsey v. Qualex, Inc., 103 N.C. App. 585, 406 S.E.2d 609, rev. denied, 330 N.C. 196, 412 S.E.2d 57 (1991).

When a claimant has been discharged from work, the employer has the burden of proof to show that the claimant's discharge was for a reason that would disqualify the claimant for unemployment insurance benefits. Intercraft, 305 N.C. at 376.

CONCLUSION OF LAW:

In the present case, the Commission concludes from the competent and credible evidence and the facts found therefrom that the claimant was discharged from employment. The Commission further concludes that the claimant was not discharged for either misconduct or substantial fault.

Based on the foregoing, the decision of the Appeals Referee must be reversed. Further, the claimant must be held not disqualified from receiving unemployment insurance benefits.

DECISION:

Pursuant to the authority of the Commission to "affirm, modify, or set aside any decision of a n appeals referee on the basis of the evidence previously submitted"' IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the decision of the Appeals Referee be, and the same is SET ASIDE, and the claimant is NOT DISQUALIFIED from receiving unemployment insurance

benefits.

This the 18th day of February 1999.

EMPLOYMENT SECURITY COMMISSION
OF NORTH CAROLINA

J. Parker Chesson, Jr.
J. Parker Chesson, Jr.
Chairman

APPEAL RIGTHS:

This decision will be come final thirty (30) days after mailing unless Judicial Review is perfected pursuant to G.S. 96-15(h) & (I). For further information, see Commission Pamphlet "Procedures for Appealing Decisions by the Appeals Referee and the Employment Security Commission," which is available in all of the Commission's local offices and has previously been provided to you.

Copies of any Petition for Judicial Review filed with the Clerk of Superior Court must be served within 10 days of the filing of the petition, by personal service or by certified mail, return receipt requested, upon the Commission and upon all parties of record to the Commission proceedings. The Commission's registered process agent for service of its copy of any petition is: Chief Counsel, c/o Legal Department, P. O. Box 25903, Raleigh, NC 27611-5903.

Commission Decision No. 99(UI) 0487

NOTE; If you are served with a Petition for Judicial Review by another party, you will not be a party to the Judicial Review unless you notify the court within ten (10) days after your receipt of the petition of your desire to become a party or file a motion to intervene as provided in G.S. 1A-1, Rule 24.

POST-DECISION PROCEEDINGS:

Any motion, petition or request for rehearing or reconsideration of this decision shall be filed with the Chief Counsel. Such motion, petition or request must be filed with the Chief Counsel no later than ten (10) days after the date the decision was mailed. Further, the motion, petition or request must contain a statement that a copy was served on any other party to the proceeding.

The grounds on which such relief may be granted are set forth in ESC Regulation No. 21.16 (D) (2), which is available for examination in all offices of the Employment Security Commission.

NOTE: Post-Decision proceedings do not stop the 30-day period for seeking judicial review from running unless the relief sought is granted.

Appeal Filed: January 15, 1999
Decision Mailed: February 18, 1999

P/Ex. 1

ADMINISTRATIVE GRIEVANCE

Wal-Mart Super Center Associate:
Mr. Calvia L. Hill
194 Paddlewheel Road
Fayetteville, N.C. 28414-0331

TO: Wal-Mart Super Center Store Manager
Mr. Brad Down

Sir 12 March 1998

After having an opportunity to work at Wal-Mart for the pass seven months, I have encounter another problem of being harassed and discriminated against by management without any just cause on my part of doing any thing wrong. As we know harassment and sex discrimination is a violation of Title VII U.S. Federal Code 42, 2000e and N.C. Gen Statue 99D-1 Interference with Civil Right.. Ignorances on any ones part of the law or policy is no excuse to justify anyone action of deliberate or arbitrarily events of disrespectful treatment of sex discrimination or repeated harassment, with the intent to impose direct or indirect threats of intimidation. "If an employee resigns because of intolerable working conditions created or permitted by the employer, this may CONSTITUTE ACTIONABLE CONSTRUCTIVE DISCHARGE.

Coach Pitty has constantly harass and discriminated, and insulted myself in the present of customer. She has also abuse or misuse her position as management to convience

herself. I have been falsely accused of not doing what I was instructed to do, by management, ie Coach Pitty try to justify her action of harassment and sex discrimination by stating that Iam the only "male" associate she can find in the department when she needs something done. Question, Why dose it allways have to be a malee associate? We do have female that draw the same pay. Coach Sandra has even call other Coaching Management to have them page me to my work place without even knowing if I was working that day or not, and only because she saw myself conversating with another associate after I had just walked in the store.

Sir I could give more events of this action by management but my question is what good would it do if nonthing is done. My pass job performance clearly shows what kind of worker that Iam and enclose the following document only as a referance point to you so that you may review my record of pass job performance/character of conduct. Sir I would trust that Wal-Mart Super Center would provide an work environment where as associate would be comfortable, and not have to under go such harassment from the Coaching Team ie, Coach Pitty, Coach Sandra, Coach Matt and Asst. Manager Leroy.

On 14 March 1998 Asst. Manager Leroy address an issue of concern to me of why did I complete the assignment that was given to me last week. I inform Mr. Leroy that I was given other things to do and did not have time. Later on that day Mr. Leroy page me to give him a phone call at 185. At about 7:40pm I call and Mr. Leroy stated that there was several things that he wanted me to do and

that Coach Pitty will get with me, to show me what need to be done. Mr. Leroy inform me to pull out any where between 7-10 pallet on the main floor for 3rd shift, so that they may start working early. And to stock all the bleach.

My response was to Asst: Manager Leroy was as such, I am going to need someone to assist me. Mr. Leroy response was NO!! you do it all by yourself you do not need any help. And I know that there was some one in that Super Center that could have given me a hand in some way. I then stated well what about me zoneing my area? Mr. Leroy response was do not worry about zoneing, just start pulling pallets from the back. And do not be concern with helping any customer in the furniture department, just take care of what I told you, and so I did. During that time customer became very frustrated because they could not get help, receive any assistant, and assistant took too long. There was nonthing I could because Mr. Leroy not to be concern with doing any thing in furniture. And this was a friday after on pay day. I believe that the task that Mr Leroy gave me was out of retaliation, because of the previous assignment he gave me on two weeks ago was not complete as stated above.

Coach A1 on the other hand knows how to manage and dose an outstanding job at it. Coach A1 knows how to effectively use P.R. skills (Personnel Relations) to accomplish what needs to be done, without miss using his authority as a manager. Coach A1 knows how to influence, in such a way that as an associate you can feel proud to work at Wal-Mart. Coach A1, as we would say in the military is a LEADER of people. You can

apporach him with concern on issue, without being looked down on . Coach A1 knows how to work with associate and not against them. The bottom line is that Coach A1 knows how to get the the jod done, in a very gracefull manner.

[Sir in closing, I trust that there will no retaliation taken because I allege an issue of sex discrimination and repeated harassment, from any Asst: manager or Coaching Team.] And if there is any adverse action of retaliation, they could be entering a area of violation of RETALIATORY EMPLOYMENT DISCRIMINATION, INTIMIDATION OF OR RETALIATION against COMPLAINANTS. U.S. Code Title 42 20000e(3a), U.S.Code Title 29 (206)d.
Sir this is not an racil issue or color issue it is an issue of proper management of of personnel better known as P.R. Skills Personnel Relations.
Sir thank you for your time.

Calvia Lynn Hill
Calvia Lynn Hill
Sale Associate
194 Paddlewheel Road
Fayetteville, N.C. 28314-0331

Cc. Wal-Mart Stores, Inc.
702 SW Eight Street
Bentonvill, AR. 72716-8611

Attn: Department of Human Relation
Director of EEO

P/Ex. 2

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NAHVILLE

CALVIA LYNN HILL	)
	)
Plaintiff, Pro Se,	) NO. 3:99-0739
	) JUDGE NIXON
v.	)
	)
WAL-MART STORES, INC..	)
CORPORATE SERVICE COMPANY	)
	)
Defendants.	)

AFFIDAVIT OF BRAD DOWNS

I have personal knowledge of the facts in this affidavit. I have based some of my statements on Wal-Mart business records. I am over the age of 18 and competent to testify to the matters stated in this affidavit.

I am the manager of the Wal-Mart on Skibo Road in Fayetteville, North Carolina. Plaintiff was hired at this store on August 7, 1997. On April 16, 1998, Wal-Mart verbally coached plaintiff for doing poor job of zoning e., cleaning and straightening his department), leaving the store prior to being signed off by management, poor merchandise management, and spending too much time visiting other departments, particularly the Tire Lube Express department, on a personal basis. (A copy of this coaching is attached as Exhibit 3 to plaintiff's reply to

Wal-Mart's motion to transfer.) On June 29, 1998, Wal-Mart gave plaintiff a written coaching for behaving in a hostile manner toward Pamela Oler, his supervisor. (A copy of this coaching is attached as Exhibit 4 to plaintiff's reply to Wal-Mart's motion to transfer.) Ms. Oler had approached plaintiff because he was talking with another associate in another department about personal matters while he was on clock. Plaintiff's argumentative attitude toward a supervisor on the sales floor could have been upsetting to customers and to other associates. On July 21, 1998, plaintiff was given a second written coaching for excessive tardiness and uabsenteeism. (A copy is attached as Exhibit 1 to this affidavit.)

On October 11, 1998, Wal-Mart gave plaintiff a decision-making day ("D-Day") for failing to report to work as scheduled or even call in about his absence. (A copy of this is attached as Exhibit 7 to plaintiff's reply to Wal-Mart's Coaching For Improvement Policy. This step gives the associate a day off with pay to decide whether he will continue to work for Wal-Mart. If the associate decides to continue his employment, then he must complete a written plan of action stating how he intends to improve. Only days after plaintiff's D-Day, plaintiff was extremely rude and offensive to a customer. The customer reported the incident. Plaintiff's behavior toward the customer was gross misconduct. It is the type of conduct for which Wal-Mart immediately terminates associates. (A copy of Brenda Collins' report on this incident is attached as Exhibit 20 to plaintiff's reply to Wal-Mart's motion to transfer; a copy of my report on this incident is attached as Exhibit 24 to plaintiff's reply to Wal-Mart's motion to transfer.) After receiving the customer's report of plaintiff's rude statements and

behavior, defendant's managers investigated the allegations by interviewing the customer and plaintiff. Wal-Mart's interviews constituted a reasonable investigation into the allegations. Based on the demeanor of those interviewed, Wal-Mart's management decided that the accusations against plaintiff appeared to be true. October 15, 1998, was plaintiff's last day. Plaintiff was terminated. Plaintiff was fired because of his repeated violations of company policy outlined in this affidavit. Plaintiff's race and gender had nothing to do with his being fired.

Plaintiff's replacement, Dominic Austin, an African-American male, was hired at the Fayetteville, North Carolina, Wal-Mart on October 31, 1998.

Brad Downs
Brad Downs

STATE OF NORTH CAROLINA
COUNTY OF *Cumberland*

Sworn to and subscribed before me on this the *8th* day of *October* 1999.

Betty S. Burhe
NOTARY PUBLIC

My Commission Expires: *7-19-2004*

P/Ex. 3

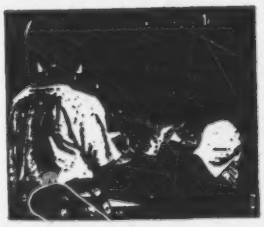
1. The customer is always right.

Sam Walton said many times that customer service distinguishes our Company from all others. "Give customers what they want — and a little more. Let them know you appreciate them. Make good on all your mistakes, and don't make excuses—apologize. Stand behind everything you do. The two most important words I ever wrote were on that first Wal-Mart sign — 'Satisfaction Guaranteed.' They're still up there, and they have made all the difference." —Sam Walton

SATISFACTION GUARANTEED

Simply stated, this means doing everything we can to please the customer. Repair, exchange or refund with a thank-you and a smile.

Customers are our livelihood. Your job is to make them feel like they are the most important part of our business by meeting their needs and exceeding their expectations. A customer is not just the person who shops in our stores, but is everyone you come in contact with. If the phone rings—it's a customer. If you receive a letter—it's a customer. If you are asked for help by a fellow associate — remember, they are also your customers.



AGGRESSIVE HOSPITALITY

One way of meeting your customers' needs and exceeding their expectations is practicing aggressive hospitality. For example, if a customer asks you where a product is:

- Meet the customer's needs by showing them where the department is.
- Exceed their expectations by taking them to the product.

Make customers feel welcome — smile, look them in the eye, and greet everyone who comes within 10 feet of you. This is called the **10 Foot Rule.** If at all possible, call the customer by name.

The People Greeter program is one example of Wal-Mart's aggressive hospitality which started a trend. The People Greeter has the unique responsibility of meeting and welcoming customers as they enter Wal-Mart stores. Officially, the People Greeter has the job of handing out shopping carts and smiles, and letting our customers know we're glad they came to Wal-Mart.

THE CUSTOMER IS THE REAL BOSS

Each one of us represents Wal-Mart to our customers. Without our customers, we would not be in business. Occasionally, you may encounter a dissatisfied customer — remember, this customer is just as important to us as the satisfied customer.

Consistently exceeding our customers' expectations is what puts us on top. If you need help with an unhappy customer, it's OK to ask your supervisor for assistance.

"All associates work for the customers who buy our merchandise. In fact, the customers can fire everybody in our Company. And they can do it by simply spending their money somewhere else. The greatest measure of our success is how well we please the customer, 'Our Boss.' Let's all support Aggressive Hospitality and have our customers leave 100% satisfied every day."

Sam Walton
The Boss' Creed

BEST AVAILABLE COPY

P/Ex. 4

"COMMUNICATE EVERYTHING YOU CAN TO YOUR ASSOCIATES. THE MORE THEY KNOW, THE MORE THEY'LL CARE. ONCE THEY CARE, THERE'S NO STOPPING THEM."
—SAM WALTON

4. We communicate with our associates.

Communication is an important part of our success. We believe that our associates will enjoy their jobs more and work smarter if they understand our Company's goals. It's also important that each associate has a way to tell others about their ideas. Below, we have listed some of the ways we communicate with each other.

OPEN DOOR — OPEN MIND

Our Open Door—Open Mind policy allows each of us the chance to be heard. It says that if you have an idea or a problem, you can go to your Coach to talk about it without fear of retaliation. If you don't feel satisfied with the response, or if your Coach is the source of your problem, you can go to his or her supervisor.

You can go up to each level of management, including our Company's top leaders, with your idea or concern. Remember, while Open Door—Open Mind promises that you will be heard without retaliation, it cannot promise that your opinion will always prevail.

WAL-MART TODAY

Wal-Mart Today is our Company magazine, produced by and for the associate-partners of Wal-Mart Stores, Inc. It began in 1970, under the name *Wal-Mart World*, and carried that name until October1993.

Today, the magazine is made available to each associate-partner in our Company. Noteworthy ideas and events are shared with other stores through the magazine. Our editors are always looking for stories to share with all our associates. *Wal-Mart Today* also prints news from Home Office departments such as Benefits, the People Division, and our executives.

P/Ex . 5

Brad Downs
10-16-98

Statement: Calvia Hill
Customer: Carolyn DeAndrade (482-3101)

On 10-16-98, customer Carolyn DeAndrade called me to discuss (3) incidents she had with associate Calvia Hill.

The first incident, Mrs DeAndrande was shopping the pet department and tore open some cat litter to feel the texture. Calvia walked down the aisle screaming at Mrs. DeAndrade demanding she stop tearing holes in bags claims Mrs. DeAndrade. Mrs. DeAndrade was terrified of Mr. Hill and ended up purchasing all the bags she tore open.

The second incident, Mrs. DeAndrade was shopping in the pet department on chemicals and felt this person behind her. She alleges that Mr. Hill rubbed against her and then put his hands on her cart and began to laugh. Mrs. DeAndrade was terrified again and left her cart and walked out.

The third incident, Mrs. DeAndrade was shopping on chemicals and saw someone learning down. She approached that person to ask where an item was and when he looked up – it was associate Mr. Hill. She claims that she was having a conversation with another customer who was helped by another associate to find the exact item "Grease Lighting" that Mrs. DeAndrade was looking for. She claim that she asked Mr. Hill where the "boy" was that helped the other customer.

She claims Mr. Hill took offense and thought she called him a "boy." Then Mrs DeAndrade asked Mr. Hill where the "Grease Lighting" was. She claims his response was "It's over in the park chaps"! (sarastically). Customer Mrs. DeAndrade is afraid of Mr. Hill; she said "What have I done to You?"; "I don't even know you." She claims he said, "I don't know you, either lady!" (yelling). She told him she was going to the manager. When she said this, she claims that Mr. Hill jumped up, got nose to nose with her and said, "Go to the manger, I want you to!" Mrs. DeAndrade found assistance manager Brenda Collins and relayed this information to her. Brenda, claims that she asked Mr. Hill to apologize to the customer. Brenda claims that Mr. Hill said, "I'm not apologizing to her, she's a racist! She called me a boy!" (in the presence of the customer).

I relayed this story to Heather in the people division – she ___ after reviewing his file and history of yelling and not controlling his temper advised to terminate Mr. Hill under violation of company policy, gross misconduct, and non rehihible.

Brad Downs 10-16-98

(**Petitioner's Note:** Brad Downs' Original statement is handwritten)

P/Ex. 6

BEHAVIORAL MEDICINE CENTER
PROGRESS NOTE

PATIENT NAME: Calvia Hill **CHART #:** 96-2508
DATE: 10/09/97

MED REVIEW: The patient returned today reporting that he has been doing fairly well. He reported that he has been having some fatigue especially in the late morning to early afternoon which he thinks that the Prozac has helped him with before even though he was only taking 10 mg a day and wondered if he should increase that. On the patient's last visit, his lithium was increased to 1,200 mg a day secondary to subtherapeutic levels. He has discontinued his Ambien because he has been sleeping much better but still has been having some ongoing awakenings. His appetite has been stable. The patient reported he has worked on some of his domestic problems with his separated wife and it looks like he has been handling the situation fairly well.

MENTAL STATUS EXAMINATION: Mood was much calmer. Affect was more level. Associations were tight. There were no psychotic symptoms. There were no suicidal or homicidal ideations

CURRENT MEDICATIONS: Prozac 10 mg a day and lithium 1,200 mg a day.

IMPRESSIONS:

AXIS I: Bipolar affective disorder, type II.
AXIS II: Narcissistic traits.
AXIS III: Gulf War fatigue syndrome.

PLAN:
1. Check lithium level.
2. Continue on lithium at current dosage.
3. Increase Prozac to 20 ma a day.
4. Return to clinic in two months.

Samuel fleishman, /initialed
Samuel Fleishman, M.D.

SF/MHT26-8851 **--CONFIDENTIAL—**
R: 10/09/97 This information is confidential and
you T: 10/14/97 are responsible for any action brought
about by disclosure of this information to unauthorized persons.

P/Ex. 7

N.C. SEAL

CALVIA LYNN HILL PETITIONER	)	STATE PERSONNEL COMMISSION DECISION AND ORDER
-VS-	)	
NORTH CAROLINA DEPART-	)	CASE NUMBER
MENT OF CORRECTION, MCCAIN CORRECTIONAL HOSPITAL RESPONDENT.	)	95 OSP 1460

The Petition For Contested Case Hearing in the above-captioned case was filed in the Office of Administrative Hearings on December 15, 1995. The Recommended Decision of Administrative Law Judge Beecher R. Gray was filed on may 17, 1996. Having received the official record from the Office of Administrative Hearings on June 21, 1996, this case was docketed for the August 8, 1996 State Personnel Commission meeting. The State Personnel Commission considered the Recommended Decision and made its decision at the meeting of August 8, 1996. Members of the Commission participating in the decision were: Chairman C. Thomas Sobol, Jr., Mr. Douglas Biddy, Ms. Angela Massengill (by telephonic hookup), and Mr. Allen Wellons.

****

APPEARANCES

For the Petitioner: Mr. Calvia L. Hill, Petitioner *pro se*

Fayetteville, North Carolina, Appearing.

For the Respondent: Mr. Michael f. Easley, Attorney General,
Ms. Paula D. Oguah, Assistant Attorney General,
North Carolina Department of Justice,
Raleigh, North Carolina, appearing.

After full consideration of this matter, including a review of the exhibits, and whole record, the State Personnel Commission enters the following **ORDER.**

I. With regard to the Findings of Fact of the Administrative Law Judge, the Commission decides as follows:

The Commission determines that the Administrative Law Judge's Findings of Fact, as modified to correct the typographical error on page 1 in the Section entitle "Issue" by the replacement of **"1996"** with **"1995"**, are supported by the substantial evidence in the record and hereby adopts those Findings of Fact as its own.

II. With regard to the Conclusions of Law of the

Administrative Law Judge, the Commission decides as follows:

The Commission determines that the Administrative Law Judge's Conclusions of Law are supported by the Findings of Fact and by the substantial evidence of the record and hereby adopts those Conclusions of Law as its own.

ORDER

The State Personnel Commission orders that the Petitioner's personnel file be expunged of the written warning issued to Petitioner on November 14, 1995 because the allegations set forth in the written warning are not supported by substantial evidence and are therefore inaccurate and misleading within the meaning of G.S. § 126-25.

APPEAL

Pursuant to G.S. § 150B-45, any party wishing to appeal the Commission's decision, may commence such an appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Commission's Decision and Order. Pursuant to G.S. § 15OB-47, the State Personnel Commission is required to file the official record in the contested case within 30 days of receipt of the petition for Judicial Review. Consequently, a copy of

the petition should be sent to the State Personnel Commission at the time the appeal is initiated in order to insure timely filing of the record.

BY: *Patsy Smith Morgan*
Patsy Smith Morgan, Administrator
State Personnel Commission

October 24, 1996
Date

Cc The Honorable Franklin Freeman
Mr. Calvia L. Hill
√ Ms. Paula D. Ogauh
Mr. Ron Gillespie
Ms. Dean Coley